



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Revision 320 of 2006**

**PETER OOKO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING ON REVISION**

The Appellant on 22<sup>nd</sup> September 2006 was arraigned before the chief Magistrate Mombasa and charged with the offence of defilement of a girl contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya.

It was said that on the 6<sup>th</sup> August 2006 in Mombasa District of the Coast Province he defiled N.W a girl aged 15 years.

The appellant pleaded guilty on the day of plea, 22.9.06 and he was convicted. He was sentenced to 15 years imprisonment.

Being aggrieved with the conviction and sentence the appellant submitted his petition of Appeal on 5<sup>th</sup> October 2006. He subsequently amended the said petition with leave of court.

On 13<sup>th</sup> November, 2006 the Honourable Chief Magistrate made an order placing the trial file before the High Court for Revision. He said as follows:

“

**ORDER**

Upon perusal of the proceedings, herein, I have noticed that the accused who admitted a charge of defilement contrary to Section 8 (3) of the Sexual Offences Act was sentenced to 15 years imprisonment by my Court on 22.09.06. That sentence was illegal because under the said section, the Accused was “liable upon conviction to imprisonment for a term of not less than 20 years ....”

When the appeal came before the Honourable Justice Ojwang for mention on the 12/10/09 he directed that the revision matter be listed for hearing on 26.10.09 and that the appeal to remain pending in the meantime.

The matter was adjourned to 16.11.09 when Hon. Justice Sergon directed that the Appellant be heard before any enhancement of the sentence under the provisions of Section 364(2) of the Criminal Procedure

Code.

When the matter came before me on 9/11/09, the Appellant submitted that he had filed his appeal within the prescribed period and that the request for revision came much later – 2 months later. As a result he applied that his appeal be heard first.

Mr. Monda for the Attorney General submitted that this was an illegal sentence. That there was no provision for such a sentence as a result the error must be corrected first and the appeal heard on the merits.

I have considered the request for revision and the submissions by both sides.

Section 364(1) gives the High Court powers of revision of convictions and other decisions of subordinate courts. The court has power conferred on it as an appeal court by sections 354, 357 and 358 and the court may enhance the sentence. The court has powers to order acquittal, alter or reverse any other orders.

Section 364 (2) provides:

“No order under this section shall be made to the prejudice of an accused person unless he has an opportunity of being heard either personally or by a advocate of his own defence.

.....”

I think that Honourable Justice Sergon had this provision in mind when he decided that the Appellant be heard on the request for revision and enhancement. The Appellant has now been duly heard as directed.

However the proviso to section 364 (2) states as follows:

“.....

Provided that this section shall not apply to an Order made where a subordinate court has failed to pass a sentence whether it was requested to pass under the written law creating the offence concerned.”

In view of the foregoing strictly the Appellant was not required to be heard on this revision which deals with illegality of the sentence. My construction is that where a subordinate court after conviction an accused does not pass the minimum sentence required or fails to pass a sentence at all, then the High Court is obliged to correct the error/illegality summarily and without calling the accused/appellant to be heard on the matter. It would have been different if there was a maximum sentence set by the law and the subordinate court in its mandate/discretion gave a lower sentence than the maximum. In his case the minimum is 20 years upon conviction and there is no power to give a lesser sentence under Section 8 (3) of the Sexual Offences Act. No 3 of 2006. It provides as follows:-

“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The trial magistrate was therefore quite correct and obliged to make the request for revision.

I do hold that in view of the said provision, the revision application had to be dealt with first before the appeal. The sentence was a nullity and no appeal could be based on it.

In exercise of this court’s revisionary powers, I do hereby set aside the sentence of 15 years and substitute with a sentence of 20 years imprisonment. The accused shall therefore serve imprisonment of twenty (20) years from the date of conviction.

The Accused having appealed within the prescribed period, I hereby order that his Appeal No. 266 of

2006 be deemed duly filed and shall proceed to admission and hearing in accordance with the law.

Orders accordingly.

Dated and delivered at Mombasa this 24<sup>th</sup> day of November 2009.

**M. K. IBRAHIM**

**J U D G E**

In the presence of:

Appellant

Mr. Onserio for the Respondent.